BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LIBBY GRANT	)	
Claimant	)	
V.	)	
	)	
AUTUMN HOME PLUS, INC.	)	Docket No. 1,075,599
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), through Christopher J. McCurdy, requests review of Administrative Law Judge Rebecca Sanders' February 29, 2016 preliminary hearing Order. George H. Pearson, III, appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the December 16, 2015 preliminary hearing transcript and exhibits thereto, the January 18, 2016 continuation of preliminary hearing transcript and exhibits thereto, and all pleadings in the administrative file.

ISSUES

Claimant alleges she injured her low back and legs while lifting a resident from the floor of respondent's nursing facility on October 30, 2015. The judge found claimant's accident was the prevailing factor causing her injury and need for medical treatment and ordered medical treatment and temporary total disability benefits.

Respondent argues claimant's injury did not arise out of and in the course of her employment. Respondent contends claimant offered misleading testimony regarding the extent of her prior back complaints, lied about hurting her back in retaliation for respondent reducing her work hours, was evasive in her testimony and should not be believed because she has multiple convictions involving dishonesty or false statement.

Claimant maintains the Order should be affirmed. Claimant contends the judge rightfully rejected respondent's efforts to paint her as an unreliable or vengeful witness. Claimant notes it is hypocritical that respondent was willing to retain her as an employee after knowing about her criminal convictions, but is now using those convictions when trying to deny her workers compensation benefits.

The issue is: did claimant sustain personal injury by accident arising out of and in the course of her employment on October 30, 2015?

FINDINGS OF FACT

The parties have divergent versions of many of the facts.

Claimant, 44 years old, began working for respondent on October 3, 2015, as a certified nurse aide (CNA). Claimant testified she was hired to work 40 hours per week.

Melanie Creollo, respondent's human resources person and claimant's supervisor, testified she advised claimant by text message on October 26 that her hours were being reduced because respondent was training a new night shift worker. Ms. Creollo testified the reduction was also because claimant had attendance issues and she intended claimant's reduction in hours to be permanent.

Claimant testified she understood her reduction in hours was only temporary, such that she had no reason to fabricate a workers compensation injury. However, in an October 26 text message from claimant to Ms. Creollo, claimant inquired if she was going to be working part-time and Ms. Creollo responded that she was not yet sure.

Betty Carswell, respondent's owner and a licensed practical nurse, testified claimant's hours were permanently reduced because of work performance. According to Ms. Carswell, by observing live video and audio of respondent's premises, she witnessed claimant using inappropriate language while talking over the phone in the presence of a resident. However, Ms. Carswell did not call claimant's attention to the unwanted behavior at that time.

Ms. Creollo testified she also observed the aforementioned live video and audio of claimant. She indicated respondent had software issues precluding the recording and preservation of what occurred. Other than Ms. Creollo discussing with claimant on October 19 that she was tardy for work on two occasions and unexplained complaints from other workers, respondent did not counsel claimant about her job performance, other than letting her know that she undercooked muffins on one occasion.

In an October 27 text message, claimant advised Ms. Creollo that it was not fair for her to have reduced hours because she was depending on full-time earnings. Claimant wanted a written explanation regarding why her hours were reduced. Further, claimant questioned if her hours were reduced due to "something personal"[1] after having met with Ms. Creollo. This meeting is not well-explained in the record; perhaps it concerned attendance and the October 19 discussion between claimant and Ms. Creollo. Claimant testified she was disappointed with her reduced hours.

[1] Cont. of P.H. Trans., Ex. 8 at 3.

Claimant did not work October 27 or 28. Claimant worked the night shift starting October 29 at 11:00 p.m. and carrying over into October 30. Claimant testified that around 5:15 a.m., she heard a 94-year-old female resident (the "resident") yell from the other end of the hallway, followed by a bump sound. Claimant testified she rushed to the resident's room and found her tangled up in a blanket on the floor against her roommate's mesh bed rail. Claimant testified the resident, who suffers from dementia, was hysterical. According to claimant, she helped the resident into a seated position, placed a gait belt around the resident and lifted her off the floor. Claimant testified that while lifting the resident and pivoting to get her into a wheel chair, the resident resisted and jerked away, causing claimant to feel a pop in her right low back and tingling down her left leg. Claimant said she put the resident in the wheel chair and took her to a recliner in a common area.

Claimant phoned Ms. Carswell about the incident, but did not tell Ms. Carswell she had hurt her back. Ms. Carswell instructed claimant to complete an incident report regarding the resident's fall, which claimant did. Claimant did not indicate in the report that she was injured lifting the resident.

Ms. Carswell testified about respondent's policy if a resident falls down – check the resident's range of motion, get vital signs and apply pressure if the resident is bleeding. Staff members are to call her for instructions before attempting to move a resident. A document titled, "Fall Protocol," which is on a refrigerator at respondent's facility, states staff should never attempt to move a fallen resident. Ms. Carswell testified when claimant called her the morning of the accident, she had not taken vital signs, she had already moved the resident and did not report injuring herself. Claimant testified respondent provided inadequate training and she was unaware of the fall protocol. Ms. Creollo testified claimant should have known about the fall protocol, either through CNA schooling, respondent's training or observing the posting on the refrigerator.

According to claimant, she had sharp pains up and down her low back as her shift proceeded. Claimant told a coworker during the shift change that she had hurt her back lifting the resident. Because Ms. Creollo was not at respondent's facility, claimant asked her coworker when Ms. Creollo would arrive. After being told Ms. Creollo would not be in that day, claimant advised her coworker she was going to the hospital and would call respondent afterward.

Sean Stringer, a driver for a transportation service, picked claimant up from work at the end of her shift. This was the first time Mr. Stringer picked claimant up from work and he indicated the travel was arranged before claimant's accident. Mr. Stringer testified claimant was not walking normally and told him she had injured herself lifting a resident off the floor. Claimant advised Mr. Stringer she had intense back pain and had him take her to the St. Francis Hospital emergency room rather than home. Mr. Stringer indicated he hardly knew claimant and had no reason to lie for her.

At St. Francis, Nicolas W. Krehbiel, M.D., diagnosed claimant with a work-related injury based on the data provided. Claimant was taken off work and prescribed medication. While at the hospital, claimant telephoned Ms. Creollo and reported hurting her back at work and was claiming workers compensation. Ms. Creollo confirmed this phone call occurred, but that someone in the background was prompting claimant on what to say. Ms. Creollo told claimant nothing could be done because claimant had already left respondent's premises. Claimant acknowledged she should have filled out an accident report before leaving the facility, but did not do so.

After being told by Ms. Creollo that nothing could be done about her injury, claimant, in lieu of proceeding home, went to her attorney's office and signed an application for hearing.[2] Claimant initially testified she went home after leaving St. Francis, but acknowledged the trip to her attorney's office occurred before going home.

After their phone call, Ms. Creollo sent claimant a text message indicating respondent's workers compensation adjuster and lawyer would communicate with claimant. According to Ms. Creollo, the insurance adjuster advised respondent not to communicate with claimant because claimant had "lawyered up."[3]

Ms. Creollo indicated Ms. Carswell physically examined the resident, but found no visible signs of injury and the resident did not recall the asserted fall. Ms. Creollo testified to her belief that claimant did not have an accident at work because the resident had no signs of injury, the resident did not recall any fall, claimant's hours were cut shortly before the asserted accident and other employees vaguely complained about claimant.

Ms. Carswell also questioned whether claimant's accident happened because the resident has been at respondent's facility for several years and when she had fallen in the past, she had mentioned such falls to respondent. Ms. Carswell indicated the resident did not recall and denied falling on October 30 and, after she conducted a "head to toe" physical examination, the resident showed no visible signs of injury. Ms. Carswell also doubted the incident occurred because the resident will not let staff put a gait belt on her.

Ms. Carswell filled out an employee evaluation form regarding claimant on October 30. The document, labeled a "90 day eval,"[4] generally indicated claimant's job performance was poor and also listed specifics, such as claimant talking inappropriately to residents and over the phone in the presence of residents on October 25, claimant making derogatory statements to other staff, claimant being argumentative with supervisors, and claimant being tardy on three dates, among other complaints. The

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[2] Claimant contends respondent forced her to seek legal counsel immediately after telling her to "screw off." Claimant's Brief at 4.

[3] Cont. of P.H. Trans. at 146.

[4] P.H. Trans., Cl. Ex. 7 at 1.

document stated Ms. Carswell was going to set up a meeting with claimant on October 31, but she was unable to meet with claimant due to claimant's injury, termination[5] and advice from respondent's insurance carrier to not speak to her. Ms. Carswell noted her 90 day evaluations are works in progress that she periodically addresses, but it was not completed until the date of claimant's asserted accidental injury.[6] Other than the attendance and muffin issues, claimant denied any bad behavior which respondent attributed to her.

Claimant went to Partners in Health on November 2, 2015. A nurse practitioner diagnosed her with a lumbar strain and provided light duty restrictions and medications.

That same day, claimant took her restrictions to Ms. Carswell and Ms. Creollo. According to claimant, she was told respondent had no available work for her. Claimant testified that she told respondent she valued her job and Ms. Creollo questioned why she would hire a lawyer so quickly if she so valued her job. Indeed, Ms. Creollo testified that she wondered why claimant hired a lawyer if she valued her job.[7] Ms. Creollo testified she recalled respondent telling claimant it would have to check with its workers compensation insurance carrier about accommodated work, but she had no further contact with claimant. Ms. Creollo testified respondent would be able to accommodate claimant's restrictions.

Doug Fillyaw, claimant's friend, testified he accompanied claimant to the meeting with respondent on November 2. He stood outside the doorway and testified he heard Ms. Creollo tell claimant respondent did not have any work available within her restrictions and they were waiting to hear back from their insurance company.[8]

On November 9, 2015, claimant returned to Partners in Health. The nurse practitioner diagnosed claimant with a low back strain, continued the same restrictions, prescribed medications and ordered physical therapy. According to claimant, she telephoned Ms. Creollo to inquire about available work and was told respondent could no longer speak with her after her claim had been relayed to its workers compensation carrier. Claimant then sent a text message to Ms. Creollo to ask whether she needed to bring in her restrictions and whether work was available, but indicated she did not receive a response.

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[5] While the document uses the word "termination," Ms. Carswell testified claimant is still respondent's employee.

[6] Claimant contends respondent's 90 day evaluation was manufactured to "smear and trash" her. Claimant's Brief at 2.

[7] Cont. of P.H. at 152-53 ("[The meeting g]ot a little testy because I am - - I was wanting to know why she lawyered up so fast since if she valued her job and - - I'm not sure. Anyway, it's just that it got a little testy.").

[8] Mr. Fillyaw denied any criminal convictions before admitting he probably did have criminal convictions. Mr. Fillyaw's credibility is highly remote to this matter.

At claimant's attorney's request, Edward J. Prostic, M.D., evaluated her on November 18, 2015. Claimant complained of low back pain radiating down her left thigh with some numbness and tingling. She told Dr. Prostic she did not have any previous low back difficulties. Dr. Prostic indicated claimant's presentation suggested an L5-S1 disc injury. He recommended light duty, medication and physical therapy. The doctor stated, "The injury sustained on or about October 30, 2015 at Autumn Home Plus is the prevailing factor in causing the injury, the medical condition, and the need for treatment."[9]

Differing from what claimant told Dr. Prostic, claimant testified that she had prior low back problems. Division of Workers Compensation records show accidental injuries involving her low back in 1997, 1998 and 2001. Claimant testified she had pulling in her low back from time to time and was treated with muscle relaxants. She did not receive any compensation for those injuries or permanent restrictions.

In February 2014, claimant was in a motor vehicle accident and received medical treatment for her neck and low back. Approximately two weeks later, claimant received additional treatment for her low back. Claimant initially testified she had no need for low back treatment from 2001 until her asserted work injury and her back was fine beforehand. However, she acknowledged some low back treatment during such time frame. Claimant also testified the motor vehicle accident primarily caused her neck pain, but she acknowledged she also had low back pain.

Claimant admitted multiple adult criminal convictions involving criminal use of a credit card (1994), attempted theft (1994) and felony theft (1995, 2001 and 2008). She denied any convictions on her employment application. Claimant contends she verbally told Ms. Creollo about all of her criminal convictions and Ms. Creollo was only interested in convictions occurring in the seven years before claimant was hired, so claimant listed none in her job application. Ms. Creollo denied restricting her inquiry to the seven year period and noted claimant only acknowledged one criminal conviction, with that being a situation in which claimant said she was framed or in the wrong place at the wrong time. Claimant testified her convictions were expunged before admitting they were not expunged. Respondent did not discharge claimant from its employment even after receiving a background check outlining her criminal history.

The judge's Order states:

> It is acknowledged that Claimant has been less than candid about her prior difficulties with her low back. However, there is no evidence that Claimant's prior low back difficulties resulted in permanent impairment or settlements for money. Despite the history of prior low back difficulties there is no evidence of prior permanent impairment or that there is a prior preexisting condition.

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[9] P.H. Trans., Cl. Ex. 5 at 2.

> However, Respondent contends that there was no witness to Claimant's incident where Claimant lifted a resident from the floor and caused injury to her low back. The resident doesn't recall the incident but she is 94 years old and has dementia. The employer did not find any indications of physical trauma to the resident. The employer thought the resident could have left her bed and laid on the floor or went to the floor without a significant fall.
>
> Claimant reported her injury to the employer within four hours of it occurring.
>
> There are certain "holes" in Claimant's story and Claimant's history of not being candid until confronted. However Claimant's history of her injury has been consistent. Claimant reported the injury to her employer within four hours of it occurring. Claimant's prior history of low back difficulties is not sufficient to find it is a pre-existing condition instead of intermittent temporary aggravation.
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> The Court finds Claimant's work accident is the prevailing factor for Claimant's current injury and need for medical treatment.[10]

Respondent appealed.

PRINCIPLES OF LAW

Claimant carries the burden of proving her right to an award of compensation based on the whole record.[11] The burden of proof is based on a "preponderance of the credible evidence" and a "more probably true than not true standard."[12]

Appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder.[13] The Board often opts to give some deference – although not statutorily mandated – to a judge's credibility findings regarding a witness where the judge has the first-hand opportunity to do so. However, the Board is as equally capable as a judge in reviewing evidence when a witness does not testify live in front of the judge.[14]

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[10] ALJ Order at 5-6.

[11] K.S.A. 2014 Supp. 44-501b(c).

[12] K.S.A. 2014 Supp. 44-508(h).

[13] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[14] See *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 142, 343 P.3d 114 (2015).

ANALYSIS

The Order is reversed. Claimant did not prove she sustained personal injury by accident arising out of and in the course of her employment.

Before addressing the basis for this decision, it is noted neither party is particularly credible. Respondent's self-created rule that a worker must report being injured at work before leaving the work premises is contrary to our workers compensation laws. Respondent's belief, through Ms. Creollo, that claimant's contentions are fraudulent based on coworkers vaguely complaining about claimant, is baseless. Further, Ms. Creollo's testimony that it was incongruous for claimant to want to keep her job after hiring an attorney the day of her accident could be interpreted as meaning a worker who wants to remain employed should not exercise his or her right to seek legal counsel.

Further evidence that respondent is playing by its own set of rules is Ms. Carswell completing a 90 day evaluation of claimant 27 days into her employment and, coincidentally, completing it on the date of claimant's asserted accidental injury.

However, claimant bears the burden of proof. While the Board often gives a judge credence in personally assessing witness credibility, the judge did not observe claimant testify live. Therefore, this Board Member is in an equally good position to assess claimant's credibility. From review of this cold record, claimant is not credible.

The coincidence of claimant being injured the very next shift after her hours were reduced is suspicious. This Board Member does not believe claimant's testimony that she viewed her reduction in hours as temporary. Claimant's own text message on October 26 asked if she was going to be working part-time. If claimant assumed she would be a full-time employee, she would not ask if she was going to be working on a part-time basis. The evidence circumstantially points to claimant knowing she was not in respondent's good graces and raises the very real concern that claimant reacted by manufacturing an injury by accident.

The circumstantial evidence does not stand alone, but is bolstered by claimant's actions, testimony and history, which preclude this Board Member from otherwise dismissing the chance coincidence of claimant asserting injury the very next shift after her hours were reduced. Other factors are cumulatively detrimental to claimant. First, claimant provided an inaccurate history of no prior low back difficulties to Dr. Prostic. While two hospital visits that included treatment for low back pain in February 2014 and remote workers compensation injuries in the late-1990s and early-2000s do not seem highly indicative of a preexisting condition, the existence of a preexisting condition is not particularly relevant when assessing witness credibility. Quite simply, claimant provided incorrect information to her hired medical expert, which downgrades her credibility, regardless of whether she had prior permanent impairment, a preexisting condition or previously recovered workers compensation benefits for prior injuries.

Second, and most damaging to claimant, is her history of criminal convictions involving dishonesty and false statement. Some of these convictions are temporally remote, but the more recent convictions, and the pattern of convictions, do not afford claimant the benefit of the doubt. Claimant did not admit any convictions in her job application. While claimant, through her testimony, admitted every such conviction, she was elusive when alleging the convictions were expunged or in trying to convince the court that Ms. Creollo only wanted to know about convictions in the seven years predating her employment application. Claimant's contentions lack credibility. Based on carefully reviewing the whole record and the evidence supporting and detracting from the respective positions of both parties, this Board Member concludes claimant did not prove she sustained personal injury by accident arising out of and in the course of her employment on the date alleged.

CONCLUSIONS

Claimant did not prove she sustained personal injury by accident arising out of and in the course of her employment on October 30, 2015.

WHEREFORE, this Board Member reverses the February 29, 2016 Award.[15]

IT IS SO ORDERED.

Dated this _____ day of April, 2016.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Rebecca Sanders

[15] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.